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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE CLOUDERA, INC.
SECURITIES LITIGATION

No. 5:19-cv-3221-LHK

Hon. Lucy H. Koh

**MOTION TO INTERVENE TO
PRESERVE CLAIMS; AND
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: February 25, 2021

Time: 1:30 p.m.

Courtroom: 8-4th Floor

NOTICE OF MOTION AND MOTION

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE, that on February 25, 2021 at 1:30 p.m., or as soon as counsel may be heard, the undersigned will move before the Honorable Lucy H. Koh at the United States District Court for the Northern District of California, San Jose Courthouse, Courtroom 8 - 4th Floor, 280 South 1st Street, San Jose, CA 95113, pursuant to Rule 24 of the Federal Rules of Civil Procedure for an Order:

1. Granting Larry Lenick and Cade Jones leave to intervene; and
2. Granting such other and further relief as the Court may deem just and proper.

Movants respectfully submit the following memorandum in support of their motion to intervene.

MEMORANDUM OF POINTS AND AUTHORITIES

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1 **I. INTRODUCTION**

2 Movants Larry Lenick and Cade Jones bring this motion to intervene for the purpose of
 3 protecting class claims that otherwise would be time barred under Section 13 of the Securities
 4 Act of 1933, 15 U.S.C. § 77m. The claims arise from misleading prospectuses and registration
 5 statement filed by Defendant Cloudera, Inc. in connection with its merger with Hortonworks, Inc.
 6 that closed on January 3, 2019. The misleading nature of the merger documents were revealed in
 7 a Cloudera press release dated March 13, 2019. On February 14, 2020, Movants, together with
 8 Lead Plaintiff, filed an amended complaint in this action asserting, *inter alia*, violations of
 9 Sections 11, 12 and 15 of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77l, and 77o, against
 10 Cloudera, Intel Corporation, its controlling shareholder, and certain current and former officers
 11 and directors of Cloudera and Hortonworks, Inc. who signed the registration statement. ECF No.
 12 91. In pertinent part, Movants' complaint alleged that the registration statement and prospectuses
 13 contained materially false and misleading statements relating to Cloudera's Unleveraged Free
 14 Cash Flow and operating cash flow margin in violation of the Securities Act. These claims were
 15 alleged 26 days prior to the expiration of the one-year statute of limitations period set forth in
 16 Section 13 of the Securities Act, or March 12, 2020.. ECF No. 91.

17 Following the filing of the Movants' complaint, the Court reopened the lead plaintiff
 18 process. Lead Plaintiff was appointed, but with different counsel. On September 22, 2020, Lead
 19 Plaintiff filed a further Amended Complaint that omitted Movants' theory of liability relating to
 20 Cloudera's Unleveraged Free Cash Flow and operating cash flow margin. ECF No. 173.

21 Pursuant to the Supreme Court's ruling in *China Agritech, Inc. v. Resh*, the statute of
 22 limitations for these claims to be asserted on a class basis is no longer tolled during the pendency
 23 of this lawsuit. 138 S. Ct. 1800, 1808 (2018) ("A would-be class representative who commences
 24 suit after expiration of the limitation period, however, can hardly qualify as diligent in asserting
 25 claims and pursuing relief. Her interest in representing the class as lead plaintiff, therefore, would
 26 not be preserved by the prior plaintiff's timely filed class suit."). Preclusion from potential claims
 27 would severely prejudice class members, especially those class members who may be unable or
 28 unwilling to pursue claims individually. Given that these claims will expire under the one-year

1 statute of limitations on October 18, 2020 (26 days after the filing of the Amended Complaint), a
 2 failure to allow intervention would result in the absent class members being precluded from
 3 litigating the claims relating to Defendants' false and misleading statements about Cloudera's
 4 Unleveraged Free Cash Flow and operating cash flow margin altogether. Therefore, Movants
 5 must move to intervene to protect the rights and interests of class members.

6 Movants satisfy the four criteria for intervention under Federal Rule of Civil Procedure
 7 24. First, Movants' motion to intervene is timely given that Movant could not have known that
 8 plaintiffs would omit Movants' claims from the Amended Complaint, and Movants file this
 9 motion just three weeks after the Amended Complaint was filed, prior to the expiration of the
 10 one-year statute of limitations, and before Defendants have responded to the Amended Complaint.
 11 Second, as a class member who would otherwise be precluded from bringing claims related to
 12 Cloudera's false and misleading Unleveraged Free Cash Flow and operating cash flow margin,
 13 Movants have a substantial interest in these claims being litigated. Third, if these claims are not
 14 brought in this action, Movants and the absent class members will be severely prejudiced if they
 15 are precluded from pursuing class claims. Fourth, as plaintiffs have failed to bring these claims
 16 on behalf of the absent class members, Movants' and the absent class members' interest have not
 17 been protected by plaintiffs and is the very reason for Movants bringing this motion in the first
 18 place.

19 Accordingly, the Court should allow Movants to intervene in this action and file the
 20 accompanying complaint-in-intervention for the purpose of protecting the class claims that are
 21 currently in jeopardy.¹

22 **II. STATEMENT OF ISSUES TO BE DECIDED**

23 1. Whether Movants should be allowed to intervene as of right under FED. R. CIV. P.
 24 24(a) to litigate claims under Section 11 of the Securities Act that were initially brought in this
 25 action but then omitted by plaintiffs; or alternatively

26 2. Whether Movants' should be allowed to intervene under FED. R. CIV. P. 24(b) to

27
 28 ¹ Movants' complaint-in-intervention is attached to the Declaration of Adam M. Apton ("Apton
 Decl.") as "Exhibit A".

litigate claims under Section 11 of the Securities Act that were initially brought in this action but then omitted by plaintiffs.

III. STATEMENT OF FACTS

A. Factual Background

Cloudera, a Delaware corporation, is a company specializing in creating platforms for data management, advanced analytical tools, and machine learning to sell to customers. ¶¶17, 34-36.² Cloudera's principal executive offices are located in Palo Alto, California and its stock trades on the New York Stock Exchange ("NYSE") under the ticker symbol "CLDR". ¶17.

Hortonworks, a Company similar to Cloudera, is an "open-source global data management solutions company which enable organizations to govern, secure and manage data of any kind, wherever it is located and turn it into actionable intelligence that will help them transform their businesses." ¶41. Within the enterprise Hadoop market, Hortonworks competes against a variety of large software and infrastructure vendors, smaller specialized companies, and custom development efforts. ¶42. Hortonworks principal competitors in this market include pure play Hadoop distribution vendors such as Cloudera. *Id.*

On October 13, 2018, Cloudera announced that it had enter into an agreement to merger with its largest competitor in the traditional-Hadoop-based open source market, Hortonworks. ¶3. Pursuant to the merger agreement, each shareholder of Hortonworks would receive 1.305 shares of Cloudera common stock in the all stock merger. *Id.* On December 28, 2018, the shareholders of Cloudera and Hortonworks each voted overwhelmingly in favor of the necessary proposal to consummate the Merger. *Id.*

Through the Registration Statement, Cloudera issued and registered 174,508,291 shares of Cloudera common stock. ¶4. Pursuant to the Prospectus and the Form 425 prospectuses, Cloudera offered and sold over 111.7 million shares of Cloudera common stock to Hortonworks'

² Citations to "¶" are to paragraphs of the complaint-in-intervention. Apton Decl. Exhibit A. These allegations are identical to those brought in the Consolidated Complaint for Violation of the Federal Securities Laws filed in the Action on February 14, 2020 (ECF 91), but omitted by plaintiffs in the Consolidated Amended Class Action Complaint for Violation of the Federal Securities Laws filed in the Action on September 22, 2020 (ECF 173).

1 shareholders in exchange for their Hortonworks shares held at the effective of the Merger that
 2 they received at the closing of Merger. *Id.*

3 The Cloudera Registration Statement and certain of the Form 425 prospectuses, however,
 4 were negligently prepared and contained numerous false statements and omitted material
 5 information required to be disclosed to investors. ¶¶5, 79. Notably, the Registration Statement
 6 contained numerous statements concerning the combined company's cash flows, including its
 7 Unleveraged Free Cash Flow and operating cash flow margin. ¶¶80, 86, 88, 90, 92. Specifically,
 8 the Registration Statement and prospectuses contained statements by Cloudera executives that,
 9 post-merger, Cloudera would operate with 15% operating cash flow margins. ¶¶80, 86, 88, 90.
 10 This was misleading because failed to disclose that the 15% operating cash flow margin figure
 11 was overstated by 5% in calendar 2020 and/or fiscal year 2021 due to the resulting effect on
 12 Cloudera's operating cash flows by applying Cloudera's billing practices to Hortonworks then-
 13 existing deferred multi-year contracts/billings (i.e. deferred revenue). ¶¶81-85, 87, 89, 91. These
 14 representations by Cloudera were also untrue because it had omitted to disclose the material fact
 15 that the 15% operating cash flow margin figure was based in a material part on Hortonworks
 16 historic billing practices and was not entirely based on Cloudera's pre-merger billing practices.
 17 *Id.* The Cloudera Registration Statement also included a table containing misleading figures for
 18 Cloudera's post-merger Unlevered Cash Flow. ¶92.

19 During after-market hours on March 13, 2019, Cloudera announced its first quarterly
 20 report as a combined company. ¶¶6, 95. During a conference call later that day to discuss
 21 Cloudera's earnings and the progress of the post-Merger combination of the two companies,
 22 Cloudera announced that it was supplanting Hortonworks billing practices with Cloudera's pre-
 23 merger billing practices. *Id.* As a result thereof, Cloudera announced a \$125 million reduction of
 24 Cloudera's operating cash flow in fiscal year 2020, a \$75 million reduction in operating cash flow
 25 in fiscal year 2021, and that as a result would not achieve a 15% operating cash flow margin in
 26 calendar year 2020 or fiscal year 2021. *Id.*

27 After the announcement of this news, Cloudera's stock price fell by \$2.90 per share, or
 28 19.85%, from its previous closing price of \$14.61 per share on March 13, 2019 to close at \$11.71

per share on extremely high trading volume that was in excess of 37.7 million shares. ¶¶7, 97.

B. Procedural Background

On June 7, 2019, named plaintiff Shanice Christie brought this action alleging violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and 78t(a), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5, promulgated thereunder. ECF No. 1. Pursuant to the Private Securities Litigation Reform Act of 1995, this Court appointed Plaintiffs Mariusz J. Klin and the Mariusz J. Klin MD PA 401K Profit Sharing Plan as the lead plaintiff and approved their selection of Levi & Korsinsky, LLP as lead counsel. ECF No. 85. On February 14, 2020, Plaintiffs filed a consolidated class action complaint that expanded the class definition and added Movants as named plaintiffs, a number of individuals and Intel Corporation as defendants, and new claims under the Securities Act. ECF No. 91. The claims alleged under the Securities Act were timely under Section 13 of that Act.

On February 29, 2020, Defendants requested that the Court consider reopening the lead plaintiff appointment process because of the changes to the consolidated class action complaint. ECF No. 117. The Court on March 18, 2020, vacated its order appointing lead plaintiff and lead counsel, ordered the publication of notice of the amended complaint in compliance with the PSLRA by April 3, 2020, and reopened the lead plaintiff appointment process. ECF No. 141.

On May 18, 2020, Movants moved for appointment as lead plaintiff and approval of Levi & Korsinsky, LLP as lead counsel. ECF No. 143. Also on May 18, 2020, Mariusz J. Klin and the Mariusz J. Klin MD PA 401K Profit Sharing Plan moved for reappointment as lead plaintiff and for approval of Kahn Swick & Foti, LLC as lead counsel. ECF No. 154. As Movants did not appear to have the largest financial interest in the case, they filed a statement of non-opposition to Klin's motion for appointment as lead plaintiff on May 28, 2020. ECF No. 155. On July 27, 2020 the Court appointed Klin as Lead Plaintiff. ECF No. 157.

Klin, along with additional named Plaintiffs Robert Boguslawski and Arthur P. Hoffman, filed a Consolidated Amended Class Action Complaint for Violations of the Federal Securities Laws on September 22, 2020. ECF No. 173. The Amended Complaint was substantially similar to the February 14, 2020 complaint filed by Lead Plaintiff and Movants and alleged claims under

both the Exchange Act and the Securities Act. Notably, however, the Amended Complaint abandoned Movants’ theories of misrepresentation relating to Cloudera’s Unleveraged Free Cash Flow and operating cash flow margin alleged in Movants’ February 14, 2020 complaint. As these claims become time barred on October 18, 2020, Movants now move to intervene to preserve these claims.

IV. ARGUMENT

Rule 24 of the Federal Rules of Civil Procedure provides for two types of intervention: (a) intervention of right, and (b) permissive intervention. *See* FED. R. CIV. P. 24(a), (b); *see also* *Ass’n De Eleveurs De Canards Et D Oies Du Quebec v. Harris*, No. 12-cv-5735 SVW (RZ), 2012 U.S. Dist. LEXIS 196134, at *3 (C.D. Cal. Aug. 8, 2012).

A. Movants are Entitled to Intervene as of Right Under Federal Rule of Civil Procedure 24(a).

Intervention exists as a matter of right when the applicant “has a legally protected interest that may be impaired by disposition of the pending action and that interest is not adequately represented by existing parties.” *In re Novatel Wireless Sec. Litig.*, No. 08cv1689 AJB (RBB), 2014 U.S. Dist. LEXIS 85994, at *5 (S.D. Cal. June 23, 2014). “Under Federal Rule of Civil Procedure 24(a), a court must grant an applicant’s request for intervention in an action if: (1) the applicant’s motion is timely; (2) the applicant ‘claims an interest relating to the property or transaction which is the subject of the underlying action’; (3) the applicant ‘is so situated that the disposing of the action may as a practical matter impair or impede [its] ability to protect that interest’; and (4) the applicant’s interest is not adequately represented by the existing parties to the action.” *In re Grupo Unidos Por El Canal S.A.*, No. 14-mc-80277-JST (DMR), 2015 U.S. Dist. LEXIS 52358, at *9 (N.D. Cal. Apr. 21, 2015) (*quoting* FED. R. CIV. P. 24(a)); *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)). “This test is interpreted broadly in favor of intervention.” *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1061 (9th Cir. 1997). “A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts” and often provides an opportunity to “prevent or simplify future litigation involving related issues.” *United States v. City of L.A.*, 288 F.3d 391, 397–98 (9th Cir. 2002).

1. Movants’ motion to intervene is timely.

The timeliness of the motion to intervene depends on the consideration of three factors: “(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for the length of the delay.” *United States v. Carpenter*, 298 F.3d 1122, 1125 (9th Cir. 2002). “Timeliness is a flexible concept; its determination is left to the district court’s discretion.” *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004). “[T]he mere lapse of time, without more, is not necessarily a bar to intervention.” *Id.*

Movants’ motion is timely as it is made approximately three weeks after Movants discovered that Lead Plaintiff had abandoned their theory of liability, prior to the expiration of the one-year statute of limitations, and before Defendants have responded to the Amended Complaint.³ The Ninth Circuit has clearly held that a motion to intervene is timely if it is made “as soon as [the intervenors] had notice that the [underlying proceeding] was contrary to their interests.” *Carpenter*, 298 F.3d at 1125 (motion to intervene was timely when made one month following the disclosure of the settlement giving rise to a basis for intervention). Further, there would be no prejudice by granting Movants’ motion as Defendants have yet to respond to the Amended Complaint. On the other hand, Movants and the absent class members would be highly prejudiced if the motion was denied as their claims would become time barred.

2. Movants have a substantial interest in this litigation.

Movants easily satisfy the requirement that it have “a sufficient interest” in the litigation. This requirement is not particularly onerous. “An applicant for intervention has a significantly protectable interest if the interest is protected by law and there is a relationship between the legally protected interest and the plaintiff’s claims.” *Alisal Water*, 370 F.3d at 919. The Ninth Circuit has observed that “[t]he ‘interest’ test is not a bright-line rule.” *Id.* The test is met if the applicant demonstrates “an economic interest [that is] concrete and related to the underlying subject matter of the action.” *Id.*

Movants have a substantial interest in this litigation as putative class members who face

³ Defendants’ response to the Amended Complaint is currently due October 27, 2020. ECF No. 161.

the possibility of being foreclosed from pursuing Section 11 claims against Defendants relating to Cloudera's Unleveraged Free Cash Flow and operating cash flow margin. Here, the underlying subject matter of the action is Cloudera's false and misleading statements issued in its Registration Statement in violation of the Securities Act. As plaintiffs failed to bring claims relating to Defendants' false and misleading statements about Cloudera's post-merger Unleveraged Free Cash Flow and operating cash flow margin issued in Cloudera's Registration Statement, there is a relationship between Movants' legally protected interest and plaintiffs' claims. *See Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001) ("An applicant demonstrates a 'significantly protectable interest' when 'the injunctive relief sought by the plaintiffs will have direct, immediate, and harmful effects upon a third party's legally protectable interests.'").

3. Movants' interests may be impaired by the disposition of this case.

"[I]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." *Sw. Ctr.*, 268 F.3d at 822 (*quoting* FED. R. CIV. P. 24). Here, there is plainly a threat that Movants' interests will be impaired by the resolution of this case.

In *China Agritech*, the Supreme Court held that an absent class member's new suit does not relate back to an earlier filed action for statute of limitation purposes if the statute of limitations has already expired. *See China Agritech*, 138 S. Ct. at 1808 ("A would-be class representative who commences suit after expiration of the limitation period, however, can hardly qualify as diligent in asserting claims and pursuing relief. Her interest in representing the class as lead plaintiff, therefore, would not be preserved by the prior plaintiff's timely filed class suit."). Therefore, under *China Agritech*, Movants must intervene in order to preserve claims that the Lead Plaintiff failed to bring on their behalf.

Here, Movants filed a complaint in this action on February 14, 2020, 26 days prior to the expiration of the one-year statute of limitations period set forth in 15 U.S.C. § 77m. ECF No. 91. However, after the reopening of lead plaintiff, plaintiffs omitted Movants' theory of liability relating to Cloudera's Unleveraged Free Cash Flow and operating cash flow margin in the Amended Complaint dated September 22, 2020. ECF No. 173. Accordingly, given that these

claims will expire under the one-year statute of limitations on October 18, 2020 (26 days after the filing of the Amended Complaint), a failure to allow intervention would result in the absent class members being precluded from bringing these claims altogether. Therefore, Movants must move to intervene to protect the rights and interests of class members.

As Movants' and the absent class members' interests will be impaired by the disposition of this case, Movants are entitled to intervene in this suit under Rule 24(a).

4. Lead Plaintiff has not adequately protected Movants' interests.

To determine whether the existing parties would adequately represent the intervenor's interests, courts consider three factors: "(1) whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect." *Sw. Ctr.*, 268 F.3d at 822. "[T]he burden of showing inadequacy is 'minimal,' and the applicant need only show that representation of its interests by existing parties 'may be' inadequate." *Id.* at 823.

Here, Lead Plaintiff has already failed to make Movants' arguments and protect their and the absent class members' interests. This failure confirms that Lead Plaintiff will not "make all the intervenor's arguments" and are not "capable and willing to make such arguments." *See Sw. Ctr.*, 268 F.3d at 822. Therefore, the fact that Movants are willing to bring this claims shows they would bring elements to the proceedings that Lead Plaintiff would neglect. Thus, the Movants have met their "minimal" burden of showing that their interests will not be adequately protected. *Id.* at 823.

* * *

As Movants satisfy the requirements of Rule 24(a), the Court should grant Movants' motion to intervene as of right.

B. In the Alternative, Movants Should be Granted Permissive Intervention under Rule 24(b).

Typically, "[p]ermissive intervention to litigate a claim on the merits under Rule 24(b) requires (1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common

question of law and fact between the movant's claim or defense and the main action." *Beckman Indus. v. Int'l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992). The Court must also consider "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." FED. R. CIV. P. 24(b)(3).

1. Movants have an independent ground for jurisdiction.

"In federal-question cases there should be no problem of jurisdiction . . . when one seeking to intervene as a plaintiff relies on the same federal statute as does the original plaintiff." *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011) (internal quotations omitted).

Here, Movants' claims arise under and pursuant to Sections 11, 12, and 15 of the Securities Act, 15 U.S.C. §§ 77k(a), 77l(a), and 77o(a). This Court has jurisdiction over the subject matter of this action pursuant to Section 22 of the Securities Act, 15 U.S.C. §77v; and 28 U.S.C. §1331. Further, Movants rely on the same federal statute as the plaintiffs.

Therefore, this requirement is easily met.

2. Movants' motion is timely.

As shown above, Movants' motion is made just three weeks after the filing of the Amended Complaint, within the one-year statute of limitations, and before Defendants have responded to the Amended Complaint. Accordingly, as set forth above, Movants satisfy this requirement. *See, e.g., Day v. Apoliona*, 505 F.3d 963, 965-66 (9th Cir. 2007) (allowing the State of Hawaii to intervene and petition for rehearing two years after the start of a case).

3. Movants' claim has common question of law and fact with the main action.

Here, the central issues of law in the Amended Complaint and Movants' complaint are the same: whether Cloudera's Registration Statement contained materially false and misleading statements. Movants' claims arise out of the same Registration Statement as Lead Plaintiffs' claims, and entail the same background facts. The only difference is that Movants allege that additional statements in Cloudera's Registration Statement relating to Cloudera's Unleveraged Free Cash Flow and operating cash flow margin to be materially false and misleading. Therefore,

1 Movants have shown that there is “a claim or defense that shares with the main action a common
 2 question of law or fact.” *See* FED. R. CIV. P. 24(b)(1)(B). Accordingly, this element is also
 3 satisfied.

4 **4. Movants’ intervention will not unduly delay or prejudice the**
 5 **adjudication of the original parties’ rights.**

6 As discussed above, no party will be prejudiced by Movants’ intervention. Further, as
 7 Defendants have yet to respond to the Amended Complaint, Movants’ intervention will not
 8 unduly delay the action. *See Grupo Unidos*, 2015 U.S. Dist. LEXIS 52358, at *16 (no undue delay
 9 or prejudice where “[t]he central issues are the same”). However, if Movants’ motion is denied,
 10 Movants and the absent class members will be highly prejudiced as they will lose the ability to
 11 proceed with their claims.

12 * * *

13 Accordingly, Movants’ motion should be granted under FED. R. CIV. P. 24(b).

14 **C. Movants’ comply with Federal Rule of Civil Procedure 24(c).**

15 “A motion to intervene must . . . be accompanied by a pleading that sets out the claim or
 16 defense for which intervention is sought.” FED. R. CIV. P. 24(c). Movants have attached as
 17 Exhibit A to the Declaration of Adam M. Apton the complaint setting forth the claims for which
 18 intervention is sought.

19 **V. CONCLUSION**

20 For the foregoing reasons, this Court should grant Movants’ motion in its entirety and
 21 allow Movants to bring claims relating to Defendants’ violation of the Securities Act that were
 22 omitted by plaintiffs as set forth in the attached complaint.

23 Dated: October 16, 2020

Respectfully submitted,

24 **LEVI & KORSINSKY, LLP**

25 /s/ Adam M. Apton

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